Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-276

WALTER TAYLOR, JR.,
AND A. J. TAYLOR,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Walter Taylor, Jr., and A. J. Taylor, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, whereby that Court affirmed the convictions of the Defendants after a jury trial.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not as yet reported, but a copy of said opinion and a copy of the Order Denying the Petition for Rehearing are annexed hereto as a part of the appendix (A 2-5).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 16, 1975. A timely Petition for Rehearing was thereafter denied by letter from the clerk dated July 7, 1975 (A 5), and judgment was issued as the mandate of the court July 15, 1975 (A 6). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The question presented by this case is as follows:

I.

DID THE COURT ERR IN SETTING A TIME LIMITATION ON A JURY'S DELIBERATION AFTER THEY HAVE ANNOUNCED THAT THEY ARE UNABLE TO ARRIVE AT A VERDICT, AND INCIDENTAL TO SAID LIMITATION GIVING THE JURORS AN "ALLEN" CHARGE?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES,

AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

Section 1.

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Walter Taylor, Jr., was charged in three counts in an indictment, the first count of which charged him with conspiring with A. J. Taylor to hold in involuntary servitude in violation of 18 U.S.C., 1584, John Bryant, Jr. and Will Herdges in violation of Title 18 U.S.C., Section 371. In addition thereto, Mr. Taylor was charged in two separate substantive counts of violation of Title 18, U.S.C., Section 1584, one count relating to the involuntary servitude of John Bryant, Jr. and one count relating to the alleged involuntary servitude of Will Herdges. A. J. Taylor was charged in the conspiracy count with his brother and also charged with one substantive violation of Title 18, U.S.C. Section 1584, wherein it was alleged that he held in involuntary servitude John Bryant, Jr. Each Defendant was found guiltv of the conspiracy count, Walter Taylor, Jr., was found not guilty of the substantive violation relating to John Bryant, Jr., but was found guilty in regard to the substantive violation relating to Will Herdges, and A. J. Taylor was found not guilty in regard to the substantive violation relating to John Bryant, Jr. Peti-

tioner, Walter Taylor, Jr., was sentenced to serve a term of two years in regard to the conspiracy count conviction and a probationary term of five years in regard to the substantive violation, said term to commence immediately upon completion of the sentence of confinement. A. J. Taylor was sentenced to a term of five years as a result of the substantive violation but in that regard the Court ordered, pursuant to the split-sentence provision of Title 18, U.S.C., Chapter 231, Section 3651, that A. J. Taylor be confined in a jail-type institution for a period of thirty-five (35) days and thereafter discharged from custody and placed on probation for the balance of the five year term. A timely Notice of Appeal was filed in behalf of both Appellants. The undersigned is court appointed for A. J. Taylor and retained attorney for Walter Taylor, Jr. Petitioners' appeals were denied by the United States Court of Appeals for the Fifth Circuit.

The following abbreviations will be used:

"R" - Record on Appeal

"A" - Appendix to Petition

STATEMENT OF FACTS

Petitioners and others had previously been charged with identical violations of the law relating to Mr. Bryant and Mr. Herdges and others and proceeded to trial in the Middle District of Florida; said trial resulted in a mistrial as a consequence of the inability of the jury to agree upon a unanimous verdict in regard to any of the Defendants. The indictment in this case is a

superseding indictment wherein several defendants were dismissed and several counts dropped.

The jury began their deliberations at 10:35 o'clock a.m. (R-32) and at 4:30 o'clock p.m. that afternoon the Court called the jurors in to advise them, in response to their question, that in the event they were unable to arrive at a unanimous decision, it would be necessary to declare a mistrial and the whole proceedings theretofore had would be lost. The Court then gave the jury an "Allen" (A 3-4) charge and directed the jurors to return the following morning to *deliberate from 9:30 o'clock a.m. until 11:30 o'clock a.m.*, at which time, if they were unable to arrive at a unanimous vedict, he would discharge them and declare a mistrial. The court further advised the jury to be in the jury room at 9:20 o'clock a.m. and after a roll call to verify that they were all present to begin their deliberations, and the court expressed its "hope that you can reach a decision within the two hour limit." The court stated that it had "no axe to grind, but I do like to see cases moved along." When the jurors were excused from the courtroom, counsel for Petitioners then had his first opportunity to move for a mistrial in light of the expression by the jurors that they could not agree and said motion for mistrial was denied. (R 33a-33e). The jury deliberations once again began at 9:30 o'clock a.m. and at 11:00 o'clock a.m. the jurors requested to hear the testimony of the prosecution witness, John Bryant. The court declined to permit the jury to hear Mr. Bryant's testimony read to them from the court reporter's notes. The court concluded its remarks to the jurors with the following statement: (R-34)

"So, thank you for trying again, and I'm going to ask you again to try up until the deadline of 11:30, please."

The jurors at 11:15 a.m. adjourned to further deliberate in connection with the case and five minutes before the hour set by the court to declare a mistrial, namely at 11:25 o'clock a.m. the court reconvened (R-34) and thereafter the verdicts rendered in this cause were returned by the jurors.

REASONS FOR GRANTING THE WRIT

The qualifications for review on certiorari, as specified in Rule 19 of this Court, are abundantly and compellingly fulfilled by the case at bar.

The specific limitations imposed by the court regarding the unfettered jury deliberations in this case coupled with an incomplete and inaccurate "Allen" charge and a failure to comply with the provisions of Rule 30, Federal Rules of Criminal Procedure, permitting counsel to make an objection to the supplemental charge out of the presence of the jury, constitute actions on the part of the trial court, not only in conflict with the decisions of other Courts of Appeals and the unambiguous language of the Defendants' Sixth and Fourteenth Amendment rights, but also, in effect, constitute an invitation to this Court to decide an important question of federal law which has not but should be decided by this Court.

After the completion of the charge of the court, the jury began its deliberation at 10:35 o'clock a.m. (R-32) and continued to deliberate until 4:30 o'clock

p.m. (R-33a). The jurors were called into the courtroom at 4:30 o'clock p.m. in order to permit the court to advise them in response to a question. that if they did not arrive at a unanimous decision, that he would have to declare a mistrial and that the whole proceedings would be lost. Incidental to the giving of the "Allen" charge, the court advised the jurors that after having deliberated for approximately five hours they should go home. return in the morning at 9:30 o'clock a.m. and deliberate until 11:30 o'clock a.m., and if they "are unable to reach an agreement, I will be very happy to discharge you from your further duty in this case and declare a mistrial, which, of course, will necessitate a trial at some other time." Incidental to the discharge of the jurors, the court after advising them not to discuss the case over the evening, stated that "I'm going to take your word that you've given me this afternoon that you will not talk to anybody, and resume your deliberations, and I hope that you can reach a decision within the two hour limit. I don't think I'm over burdening you in asking you to try a little harder because I said something to you this morning and I again repeat it . . ."

Counsel for Petitioners moved for a mistrial in light of the expression of opinion by the jurors that they could not reach a unanimous decision and further moved that the jurors be permitted to continue their deliberations during the evening rather than return in the morning to deliberate, which motion was denied. (R 33c, 33d, 33e).

Rule 30, Federal Rules of Criminal Procedure, dealing with instructions by a court in criminal cases,

provides that no party may assign as error any portion of the charge or omission therefrom to which he does not object before the jury retires, but goes on to state that:

> "Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

Without prior consultation with counsel or any advice to counsel of what the court intended to do in response to the question posed by the jurors as hereinabove set out, the following then occurred in open court in the presence of the jurors: (A 3-4)

> "THE COURT: I've had a question from the jury that if we don't have a unanimous decision, what is the procedure. The procedure is, it will be necessary for me to grant what is known as a mistrial, and this whole proceeding will be lost. And I may as well tell you that I'm going to ask you to come back tomorrow. And I think you as jurors should consider that the case must at sometime be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there's no reason to suppose that the case will ever be submitted to the jury, to a jury of more intelligence, more impartial, or more competency to decide it than you, or that more or clearer evidence will be produced on one side or the other.
>
> "Now, I ask you to do exact justice as between the government and the defendants. I am not in any way going to try to coerce you into reaching a decision, if you can't agree unanimously. But I do want, if I don't have objections from one side

> or the other, I would want you to come back tomorrow morning and please try and see if you can't reach an agreement. And you considered it now I guess pretty much for five hours, and that's a pretty long time to discuss the matter. And if within two hours, between 9:30 and 11:30, you are unable to reach an agreement, I will be very happy to discharge you from further duty in the case and declare a mistrial, which, of course, will necessitate a trial at some other time. So would you please come back tomorrow morning and try and see if you can conscientiously reach a unanimous verdict. Are you willing to do that, every one of you?
>
> (The jury indicated affirmatively.)
>
> "THE COURT: All right. Please, I'm going to ask you to do that. Now, is there any objection on the part of the government upon that procedure?
>
> "MR. FISHKIN: No, your Honor.
>
> "MR. LEVINE: I have no objection to the jury retiring for the evening.
>
> "THE COURT: Pardon me.
>
> "MR. LEVINE: I have no objection to the jury retiring for the evening and returning in the morning.
>
> "THE COURT: That's the only question I ask. Please be in the jury room, members of the jury, by 9:25 tomorrow, and the clerk will call the roll. And if you're all present, please resume deliberation. I'm going to take if for granted, since the case has been given to you for evaluation and decision that none of you will, under any circumstances tonite talk to anybody about the case, even the im-

mediate members of the family, your wives and so forth. I'm going to ask you to refrain, if you would, please. from any discussion of this case tonite with anybody else. Now, all agree to that? (The jury indicated affirmatively.)

"THE COURT: I've seen all twelve heads nod that they would. Therefore, ladies and gentlemen it's been a long day for you. and I hope y'all have a good night's sleep, and I'll see you tomorrow morning. I'm not going to bring you back to court and ask you if you've talked to anyone. I'm going to take your word that you've given me this afternoon that you will not talk to anybody, and resume your deliberations. and I hope that you can reach a decision within the two hour limit. I don't think I'm over burdening you in asking you to try a little harder because I said something to you this morning, and I again repeat it. You will be a great aid to the administration of justice when you agree upon a verdict based upon the law of the elders. And it is upon the utmost concern of the court where the verdict lies, for the government or the defense. All I'm here to do is give you the law and see that the law is properly conducted according to the rules of evidence and the rules of procedure. That is my only interest in the case. So I have no axe to grind, but I do like to see cases move along. But I only want them moved along if the verdict represents the conscientious individual judgment of each juror and is unanimous. So good night, ladies and gentlemen, and I'll see you sometime tomorrow morning."

As indicated above, the jurors were then directed to retire, and prior to the time that they left the jury room, which was counsel's first opportunity to state any objection to the procedure and instruction, out of

the presence of the jury, counsel for Petitioners immediately moved for a mistrial and insisted that the jurors continue to deliberate or, in the alternative, that the request for mistrial be granted (R 33a-33e). The colloquy between court and counsel at the aforesaid time was as follows:

"MR. LEVINE: Before you leave the bench, I'd like to address myself to the record after the jurors leave, if I might.

"THE COURT: You're excused ladies and gentlemen. (The jury was excused from the court room.)

"THE COURT: *Now say what you have to say and say it fast.* (Emphasis added.)

"MR. LEVINE: Your Honor, please, in light of the expression on the part of the jurors, in the question they asked of you, I would move the Court declare a mistrial in light of that expression and ask that the jurors not return to deliberate. But, if you want to overrule that motion, I insist that they finish this evening, if your Honor is going to overrule that.

"THE COURT: Of course, I am going to overrule it. I have in no way coerced the jurors. What I have said to them is equal, if not more so favorable to the Defendant than it is to the Government. *So I am now beginning to distrust your position in this case.* Recess until tomorrow morning." (Emphasis added.)

After the jury returned in the morning for deliberation, starting at 9:30 o'clock a.m., at 11:10 o'clock a.m. the jury having deliberated an hour and forty-five

minutes of the two hours allotted to them, the jurors sent in a note, seeking to have presented to them the testimony of the key prosecution witness. (R-33). The court declined to permit the jury to have this testimony because it had not been transcribed, although the court reporter was available, and the court directed the jurors to proceed with their deliberation with the following statement: (R-34)

> "So, thank you for trying again, and I'm going to ask you again to try up *until the deadline of 11:30, please.*" (Emphasis added.)

The jury began their deliberation once again at 11:15 o'clock a.m., and five minutes before the deadline, returned the guilty verdicts herein sought to be reviewed.

The "Allen" instruction, *Allen v. United States,* 164 U.S. 492, 501-502, 17 S.Ct. 154, 41 L.Ed. 528 (1896), has been severely and generally criticized as an unwarranted invasion of the fact finding process of the jury. See Judge Brown dissenting in *Huffman v. United States,* 297 F.2d 754 (5th Cir., 1962); Judge Wisdom dissenting in *Andrews v. United States,* 309 F.2d 127 (5th Cir., 1962), and speaking for the court in *Green v. United States,* 309 F.2d 852 (5th Cir., 1962). The "Allen" instruction given by the court was in and of itself incomplete, misleading and inconsistent with the standards set out by the American Bar Association under which this type of instruction may be given and the language of said instruction and the authorities that even approved giving such instruction to a deadlocked jury. A skeletonized listing of the improper aspects of the "Allen" instruction reflects the following:

1. Duty to decide and settle a case.
2. Means much to both parties.
3. Juror should consider that the case must be decided at some time.
4. Will not be easier for others.
5. Inconvenience to judge and others.
6. An agreed upon verdict based upon the law of the elders will be a great aid to the administration of justice.
7. All must be done over.
8. Frequently difficult to decide, but no way to escape except to shift the responsibility to other jurors.

The court's "Allen" instruction was coupled with a time limitation for deliberation imposed by the Court prior to the discharge of the jury in the evening, and then once again after the jury had deliberated for an hour and forty-five minutes in the morning.

In the case of *Burroughs v. United States,* 365 F.2d 431 (10th Cir., 1966) a case which dealt with a less pointed and direct situation than that which appears herein, the court reversed the conviction of the defendant finding plain error going "to the heart of the judge-jury relationship as it affects the fundamental right to a fair and impartial trial" and held as follows:

> "But, in any event, it is one thing to recall the jury to beseech them to reason together, and it is quite another to entreat them to strive toward a verdict

> by a certain time. When these admonitions are considered in their context, they are subject to the clear inference that the Judge was unduly anxious to conclude the suit, and we think it entirely reasonable to infer that the jury was aware of his anxiety. This type of verdict-urging on the part of the Court, tends to undermine the proper function of the common law jury system as contemplated by the Seventh Amendment. We must guard against any such subtle inroads."

The Tenth Circuit has recently spoken again in regard to the same issue in the case of *Goff v. United States*, 446 F.2d 623 (10th Cir., 1971) where it held that the "Allen" type instruction under the circumstances was proper, but that the admonition to the jury "if you cannot (reach a verdict) within, oh, we'll say the next hour or so and probably ought to go to lunch first, then; we'll have to declare a mistrial and set the case down for hearing again," constituted reversible error when the jury returned a guilty verdict approximately one hour and twenty-five minutes after the aforesaid instruction on the basis that such instruction coupled with the time limitation was impermissibly suggestive and coercive.

The law is clear that the court must avoid any indication of coercion and when such appears its actions constitute reversible error. See 93 ALR 2d 627 (1964); *United States v. Diamond*, 430 F.2d 688 (5th Cir., 1970); *Brandom v. United States*, 431 F.2d 1391 (7th Cir., 1970).

Without, in any way, attempting to distinguish the aforesaid Tenth Circuit authorities, the opinion of the court below simply stated that:

> ". . . We do not accept the proposition that a time deadline added to an "Allen" charge is in and of itself reversible error."

It is axiomatic that a defendant in a criminal proceeding has a right to a fair and impartial jury trial, and although under a given set of circumstances instructing a jury as the trial court did may not be reversible error, where there exists a specific limitation on the unfettered right of the jury to fairly and properly evaluate a case at its leisure, or there appears any indication of coercion, such action on the part of the trial judge constitutes reversible error whether or not objection has been made to the actions of the trial judge, particularly where counsel is not given an opportunity to make such objections, said error being of a constitutional dimension which warrants and requires resolution by this Court in light of the specific conflict created by the opinion below and the opinions cited of the Tenth Circuit.

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent. The matters involved are of extreme general and national significance. The question presented has not been, but should properly be, conclusively determined by this Court. The holding below cannot be reconciled with other Courts of Appeals and the constitutionally protected rights of a trial by jury and due process of law.

The maintenance of uniformity in the administration of criminal justice in the federal courts is jeopardized by the decision below. For all of the reasons listed above, it is most strenuously urged that this Court exercise its discretion and grant the Writ.

LEVINE, FREEDMAN & HIRSCH, P.A.

BY _____

Arnold D. Levine, Esquire
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorneys for Petitioners

APPENDIX

IN THE

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UNITED STATES of America, Plaintiff-Appellee,

v.

Walter TAYLOR, Jr., and A. J. Taylor, Defendants-Appellants.

No. 74-1657.

United States Court of Appeals, Fifth Circuit.

May 16, 1975.

Defendants were convicted in the United States District Court for the Middle District of Florida, Thomas J. Clary, J., sitting by designation, of conspiracy to hold to involuntary servitude, one defendant was convicted of holding to involuntary servitude, and defendants appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that the giving of an "Allen" charge, allowing the jury to retire after six hours of deliberation and giving them two more hours to reach a verdict in the morning, was not plain error, particularly where defense counsel had ample opportunity to object to the deadline procedure and to request curative instructions as to any objectionable portions of the trial court's remarks but failed to do so.

Affirmed.

1. Criminal Law ⇐1174(1)

Time deadline added to "Allen" charge is not in and of itself reversible error.

2. Criminal Law ⇐863(1)

Every "Allen" charge situation must be decided upon particular facts and circumstances in individual situation.

3. Criminal Law ⇐1039

In prosecution for conspiracy and holding to involuntary servitude, giving of "Allen" charge, allowing jury to retire after six hours of deliberation and giving them two more hours in morning to reach verdict, was not plain error, particularly where defense counsel had ample opportunity to object to deadline procedure and to request curative instructions as to any objectionable portions of trial court's remarks but failed to do so. Fed. Rules Crim.Proc. rules 51, 52(b), 18 U.S. C.A.

Appeal from the United States District Court for the Middle District of Florida.

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Appellants Walter Taylor, Jr. and A. J. Taylor were indicted under 18 U.S.C. § 1584, holding to involuntary servitude,[1] and 18 U.S.C. § 371, conspiring to violate § 1584. Walter Taylor, Jr. was charged with two substantive counts related to two separate individuals, John Bryant, Jr. and Will Herdges, allegedly held by him to involuntary servitude, and with a conspiracy count related to both Bryant and Herdges. A. J. Taylor was charged jointly with his brother on the conspiracy count and on a substantive count related to Bryant. They were tried jointly. Both men were convicted on the

1. Title 18, U.S.C. § 1584 provides:

> Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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conspiracy count and both were acquitted on the substantive counts related to Bryant. Walter Taylor, Jr., was found guilty on the Herdges substantive count. They jointly appeal their convictions. Having considered their contentions of error in the trial below, we affirm the convictions.

The only assignment of error which is substantial enough to warrant discussion is their contention that the trial judge erred in making certain statements to a deadlocked jury in the nature of a supplemental *Allen* charge[2] and concomitantly giving the jury a time limit within which to reach a verdict, stating to the jury that the consequences of not reaching a unanimous verdict by that deadline would be a mistrial.

The supplemental charge by the trial court[3] was given when, six hours after the jury retired to deliberate, it requested advice from the trial court as to the procedure to follow in the event there was not a unanimous decision. The trial court told the jury that its failure to reach a unanimous decision would result in a mistrial. He indicated his intention to dismiss the jury for the evening and have them return the following morning to deliberate two more hours.

2. Allen v. United States, 164 U.S. 492, 501–02, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

3. "THE COURT: I've had a question from the jury that if we don't have a unanimous decision, what is the procedure. The procedure is, it will be necessary for me to grant what is known as a mistrial, and this whole proceeding will be lost. And I may as well tell you that I'm going to ask you to come back tomorrow. And I think you as jurors should consider that the case must at sometime be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there's no reason to suppose that the case will ever be submitted to the jury, to a jury of more intelligence, more impartial, or more competency to decide it than you, or that more or clearer evidence will be produced on one side or the other.

"Now, I ask you to do exact justice as between the government and the defendants. I am not in any way going to try to coerce you into reaching a decision, if you can't agree unanimously. But I do want, if I don't have objections from one side or the other, I would want you to come back tomorrow morning and please try and see if you can't reach an agreement. And you considered it now I guess pretty much for five hours, and that's a pretty long time to discuss the matter. And if within two hours, between 9:30 and 11:30, you are unable to reach an agreement, I will be very happy to discharge you from further duty in the case and declare a mistrial, which, of course, will necessitate a trial at some other time. So would you please come back tomorrow morning and try and see if you can conscientiously reach a unanimous verdict. Are you willing to do that, every one of you?
(The jury indicated affirmatively.)

"THE COURT: All right. Please, I'm going to ask you to do that. Now, is there any objection on the part of the government upon that procedure?

"MR. FISHKIN: No, your Honor.

"MR. LEVINE: I have no objection to the jury retiring for the evening.

"THE COURT: Pardon me.

"MR. LEVINE: I have no objection to the jury retiring for the evening and returning in the morning.

"THE COURT: That's the only question I ask. Please be in the jury room, members of the jury, by 9:25 tomorrow, and the clerk will call the roll. And if you're all present, please resume deliberation. I'm going to take it for granted, since the case has been given to you for evaluation and decision, that none of you will, under any circumstances tonite talk to anybody about the case, even the immediate members of the family, your wives and so forth. I'm going to ask you to refrain, if you would, please, from any discussion of this case tonite with anybody else. Now, all agree to that?
(The jury indicated affirmatively.)

"THE COURT: I've seen all twelve heads nod that they would. Therefore, ladies and gentlemen, it's been a long day for you, and I hope y'all have a good night's sleep, and I'll see you tomorrow morning. I'm not going to bring you back to court and ask you if you've talked to anyone. I'm going to take your word that you've given me this afternoon that you will not talk to anybody, and resume your deliberations, and I hope that you can reach a decision within the two hour limit. I don't think I'm over burdening you in asking you to try a little harder because I said something to you this morning, and I again repeat it. You will be a great aid to the administration of justice when you agree upon a verdict based upon the law of the elders. And it is upon the utmost concern of the court where the verdict lies, for the government or the defense. All I'm here to do is to give you the law and to see that the law is properly conducted according to the rules of evidence and the rules of procedure. That is my only interest in the case. So I have no axe to grind, but I do like to see cases moved along. But I only want them moved along if the verdict represents the conscientious individual judgment of each juror and is unanimous. So good night, ladies and gentlemen, and I'll see you sometime tomorrow morning."

At this point, counsel for the defendants stated unequivocally to the court, "I have no objection to the jury retiring for the evening and returning in the morning." After the jurors were dismissed, however, he moved for a mistrial on the grounds that the jurors had expressed an inability to reach a unanimous verdict; alternatively, if that motion were denied, he "insist[ed] that they [the jury] finish this evening." Counsel never objected to the instructions he now alleges as error, nor did he request curative instructions be given by the trial court. The following morning, the jury returned with its verdict five minutes before the deadline.

Because defense counsel did not object to the charge, our review of this asserted error in the Taylors' trial is limited by the "plain error" rule, Fed.R.Crim.P. 52(b), which is to be invoked "only where the error complained of seriously affects the fairness or integrity of the trial and the appellate court must take notice of it to avoid a clear miscarriage of justice." Moore v. United States, 399 F.2d 318, 319 (5th Cir. 1968), cert. denied, 393 U.S. 1098, 89 S.Ct. 893, 21 L.Ed.2d 789.

[1–3] The appellants rely upon two cases decided by the Tenth Circuit, Burroughs v. United States, 365 F.2d 431 (10th Cir. 1966), and Goff v. United States, 446 F.2d 623 (10th Cir. 1971), where giving the *Allen* charge to a deadlocked jury in combination with a time limitation on further deliberations was held to be reversible error. We do not accept the proposition that a time deadline added to an *Allen* charge is in and of itself reversible error. Every *Allen* charge situation must be decided upon the particular facts and circumstances of the individual situation. Powell v. United States, 297 F.2d 318, 322 (5th Cir. 1961). Having considered all the circumstances surrounding the supplemental charge here, as well as the charge itself, we find that the plain error rule prohibits our taking cognizance of this allegation of error. Counsel had ample opportunity to object to the deadline procedure and to request curative instructions as to any objectionable portions of the trial court's remarks, Fed.R.Crim.P. 51.

The remaining contentions of error are clearly without merit.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

July 7, 1975

TO ALL COUNSEL OF RECORD

No. 74-1657 - U. S. A. vs. Walter TAylor, Jr., Et.-Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by Barbara Kreci
Deputy Clerk

cc: Mr. Arnold D. Levine
Mr. Richard A. Hirsch
Mr. John F. Conroy
Messrs. John L. Briggs
William H. James
Mr. Claude Tison, Jr.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1657

D. C. Docket No. 73-162-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER TAYLOR, JR., and A. J. TAYLOR,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 16, 1975

Issued as Mandate: JUL 15 1975

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the United States Attorney's Office, Post Office Box 2841, Tampa, Florida and the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this _____ day of August, 1975.

_____

ARNOLD D. LEVINE

Supreme Court, U. S.
FILED
OCT 22
MICHAEL

No. 75-276

In the Supreme Court of the United States

OCTOBER TERM, 1975

WALTER TAYLOR, JR. AND A. J. TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-276

WALTER TAYLOR, JR. AND A. J. TAYLOR, PETITIONERS

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred in giving a supplemental instruction to the jury which contained an "*Allen* charge" and a request that the jury deliberate further for a specified period of time.

1. After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiracy to hold to involuntary servitude (see 18 U.S.C. 1584), in violation of 18 U.S.C. 371. Petitioner Walter Taylor, Jr., was also convicted of a substantive violation of 18 U.S.C. 1584.

which, of course, will necessitate a trial at some other time. So would you please come back tomorrow morning and try and see if you can conscientiously reach a unanimous verdict. Are you willing to do that, every one of you? (The jury indicated affirmatively.)

The court then asked if there were any objections to the proposed procedure, and neither side objected. Petitioners' counsel said specifically: "I have no objection to the jury retiring for the evening and returning in the morning" (Pet. 9).[2] The court then continued, telling the jury (Pet. App. A-3 to A-4, n. 3):

> * * * I'm going to take your word that you've given me this afternoon that you will not talk to anybody, and resume your deliberations, and I hope that you can reach a decision within the two hour limit. I don't think I'm over burdening you in asking you to try a little harder because I said something to you this morning, and I again repeat it. You will be a great aid to the administration of justice when you agree upon

[2] The colloquy between the court and counsel was as follows (Pet. App. A-3, n. 3):

> The Court: * * * Now, is there any objection on the part of the government upon that procedure?
> Mr. Fishkin: No, your Honor.
> Mr. Levine: I have no objection to the jury retiring for the evening.
> The Court: Pardon me.
> Mr. Levine: I have no objection to the jury retiring for the evening and returning in the morning.
>
> * * * * *

> a verdict based upon the law of the elders. And it is upon the utmost concern of the court where the verdict lies, for the government or the defense. All I'm here to do is to give you the law and to see that the law is properly conducted according to the rules of evidence and the rules of procedure. That is my only interest in the case. So I have no axe to grind, but I do like to see cases moved along. But I only want them moved along if the verdict represents the conscientious individual judgment of each juror and is unanimous. So good night, ladies and gentlemen, and I'll see you sometime tomorrow morning.

After the district court had finished speaking to the jury, counsel for petitioners asked if he could "address * * * the record after the jurors leave * * * " (Pet. 11). The court excused the jury from the court room. Counsel thereupon moved for a mistrial "in light of that expression [*i.e.*, the jury's question as to the procedure to be followed if they did not have a unanimous decision] and ask that the jurors not return to deliberate. But, if you want to overrule that motion, I insist that they finish this evening * * * " (*ibid.*). The court denied the motion for mistrial (*ibid.*).

2. Contrary to petitioners' contention that they were not given an opportunity to object to the supplemental charge (Pet. 6), the record shows they were given such an opportunity both when the jury was present and when it had left. Petitioners' counsel at first said he had no objection to the proposal to ex-

cuse the jury for the evening and to have them return in the morning. After the jury had been excused, counsel for petitioners changed his mind about this procedure. However, at no time did he object to the content of the *Allen* charge or to the proposed limit on deliberation time. Thus, the court of appeals correctly stated (Pet. App. A-4):

> [O]ur review of this asserted error in the Taylors' trial is limited by the "plain error" rule, Fed. R. Crim. P. 52(b), which is to be invoked "only where the error complained of seriously affects the fairness or integrity of the trial * * *."

The district court's instruction was not coercive and therefore did not constitute plain error. The court was careful to abjure any attempt to force the jury to reach a verdict unless such verdict represented the "conscientious individual judgment of each juror" (Pet. App. A-4, n. 3). The court's suggestion of a time limit in this case is most reasonably construed not as coercion but as an assurance to the jurors that they would not have to deliberate for an indefinite period. The court said: "And you considered it now I guess pretty much for five hours, and that's a pretty long time to discuss the matter. And if within two hours * * * you are unable to reach an agreement, I will be very happy to discharge you from further duty in the case and declare a mistrial * * *" (Pet. App. A-3, n. 3). The instruction scrupulously did not indicate the judge's view of the evidence or of the appropriate verdict. Nor did the instruction contain an admonition to the jurors in the minority to

reconsider their views, the aspect of the traditional *Allen* charge found troublesome by some of the courts of appeals. *See, e.g., United States* v. *Thomas*, 449 F.2d 1177, 1181 (C.A.D.C.); *United States* v. *Fioravanti*, 412 F.2d 407, 415-417 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F.2d 930, 933-934 (C.A. 7), certiorari denied, 396 U.S. 1017. Thus, we submit that the court of appeals was correct in stating (Pet. App. A-4, n. 3):

> Having considered all the circumstances surrounding the supplemental charge here, as well as the charge itself, we find that the plain error rule prohibits our taking cognizance of this allegation of error.

Finally, petitioners contend (Pet. 13-15) that the court of appeals' decision conflicts with *Burroughs* v. *United States*, 365 F.2d 431 (C.A. 10), and *Goff* v. *United States*, 446 F. 2d 623 (C.A. 10). In Goff, the supplementary instruction about time limits for deliberation was objected to, and the court therefore did not consider whether it constituted plain error. Thus, *Goff* does not conflict with the instant case. In *Burroughs*, the Tenth Circuit appears to have held an instruction about time limits for deliberation to be plain error, but the court does not appear to have established a *per se* rule. The court analyzed the particular charge involved in the case and concluded: "We think the charge in this case went beyond the permissible limits of the Allen charge as it has been construed and approved by this court" (365 F. 2d

at 434). The demarcation between permissible and impermissible *Allen* charges is not susceptible to bright line rules; the ultimate question whether a defendant has received a fair trial is a factual one. Thus, *Burroughs* and the instant case represent not a clear conflict of legal principles but different conclusions based on different facts.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

OCTOBER 1975.

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[3] The development and use of the *Allen* instruction is being reexamined by the courts of appeals. Although no court of appeals has held that the traditional *Allen* charge is *per se* impermissible, several courts of appeals appear to have determined in the exercise of their supervisory power that the traditional form of the instructions should be abandoned in favor of a modified form. See *United States* v. *Fioravanti, supra; United States* v. *Brown, supra; United States* v. *Thomas, supra.* See also *United States* v. *Silvern,* 484 F.2d 879 (C.A. 7); Instruction 8.11 of *Jury Instructions and Forms for Federal Criminal Cases,* 27 F.R.D. 39, 97-98; Comment, *Instructing Deadlocked Juries: The Present Status of the Allen Charge,* 3 Tex. Tech. L. Rev. 313, 317-319, 327-331 (1972); Note, *The Allen Charge Dilemma,* 10 Amer. Crim. L. Rev. 637, 664 n. 108, (1972); Comment, *Instructing Deadlocked Juries in Light of the Trial of Juan Corona,* 53 Ore. L. Rev. 213, 215-216 (1974). We do not believe that it would be appropriate for this Court to reconsider *Allen* at this time, especially not in the context of this case, which presents only the narrow question whether an alleged error constitutes plain error.

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